Enloe Medical Center *and* California Nurses Association. Case 20–CA–31241

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 23, 2004, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified below.[3]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that Union Representative Kevin Baker requested that the Respondent bargain about the effects of its change to the on-call policy in a May 9, 2003 e-mail message, and that the Respondent violated Sec. 8(a)(5) by refusing the request. In light of this finding, we find it unnecessary to rely on the judge's finding that Baker made two additional requests to engage in effects bargaining on May 12 and 14. Nor do we pass on the judge's finding that the Respondent's announcement of the change to the on-call policy was presented to the Union as a fait accompli, absolving the Union from its obligation to request effects bargaining.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by "coaching" nurses Cathe Lawson and Cindy Smith against their continued "complaining" and "negative behavior," Chairman Battista does not suggest that employers are generally prohibited from counseling employees about factors relating to employee morale. See generally *SKD Jonesville Division L.P.,* 340 NLRB 101, 102 (2003). Here, however, Chairman Battista finds that the Respondent violated the Act because the particular "complaining" and "negative behavior" included Sec. 7 activity. In this context, the Respondent's admonition that the negative behavior and complaining were expected to cease was unlawful.

[3] The Respondent correctly observes in its exceptions that there was no allegation or evidence that the violations found by the judge resulted in any economic loss to employees and that the judge, therefore, erred by including a recordkeeping provision in his recommended Order for the purpose of calculating backpay. We shall modify the recommended Order by deleting this provision. As requested by the Respondent, we shall also modify the language of pars. 1(a) and 2(a) of the recommended Order, and include a new notice, to specify that the Respondent's bargaining obligation pertains to the effects of its change to the on-call policy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Enloe Medical Center, Chico, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the first two lines of paragraph 1(a).

"(a) Failing to bargain in good faith with the Union, as the exclusive representative of employees in the following appropriate unit, concerning the effects of its change in the on-call policy in the Women's Services Department."

2. Substitute the following for the first four lines of paragraph 2(a).

"(a) On request, bargain with the Union as the exclusive representative of employees in the unit described in paragraph 1(a) above, concerning the effects of its change in the on-call policy in the Women's Services Department."

3. Delete paragraph 2(b) and reletter the following paragraphs.

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith with the California Nurses Association as the exclusive representative of our employees in the following appropriate bargaining unit concerning the effects of our change in the on-call policy in the Women's Services Department:

All full-time and regular part-time, per diem, and casual registered nurses whose duties primarily involve

providing patient care, i.e., those classified as "registered nurse" in the following areas: ambulatory services, cardiac cath lab, cardio stepdown, behavioral health, cancer center, extended care, children's health, prompt care, CT scanner, DCU, emergency, EOC-cardio-pulmonary rehab, EOC-endoscopy clinic, EOC-Infusion, EOC-prompt care, EOC-surgery, gastro-intestinal, home care, hospice, ICU/CCU, interventional radiology, med/surg oncology, medical/surgical (also known as Medical East), med/surg ortho (also known as Third Floor), N/TSICU, ob-maternity, pediatrics, post-anesthesia care, radiation-oncology, radiology, rehabilitation care, surgery services, SWAT (float pool nurse), Touchstone (also known as Options for Recovery), women's services, and wound/ostomy services; and breast educator nurse; diabetes educator nurse; cardiovascular educator nurse; rehab intake coordinator; relief charge nurses; and registered nurse first assists, employed by the employer at its facilities located at Esplanade Hospital at 1531 Esplanade, Chico, California 95926; Cohasset Hospital at 560 Cohasset Road, Chico, California 95926; Rehabilitation Center, at 340 West East Avenue, Chico, California 95926; Outpatient Center at 888 Lakeside Village Commons, Chico, California 95928; Homecare & Hospice at 1390 East Lassen Avenue, Chico, California 95973; and Children's Health Center at 277 Cohasset Road, Chico, California 95926. Excluding: all other employees, office clerical employees; managerial employees; guards; outside registry nurses; "traveler" registered nurses; confidential employees nurse practitioners; Case Managers, all other educators including Acute Care Educator, Clinical Coordinator Educator, Clinical Educator, and RN-Educator; Admitting Nurse; Employee Health Nurse; Infection Control Nurse; Liaison Nurses; program manager, registered nurses at Los Molinos clinic; registered nurses in Public Relations; registered nurses employed in positions which do not require current licensure as an RN; and supervisors as defined in the Act, including but not limited to, Administrative House Supervisor, Charge Nurse, Chief Flight Nurse/PCC, Clinical Coordinator, Clinical Director, Coordinator-Projects (Surgery Services), Coordinator (RN), Director, Manager, Nurse Directors, Quality Project Coordinator, Quality/Risk/Trauma Coordinator (Utilization Management), Supervisor-EOC, Trauma Care Coordinator, Vice President Outpatient Services and Vice President Surgical Services.

WE WILL NOT bypass the Union and deal directly with employees in the bargaining unit concerning wages, hours, and other terms and conditions of employment.

WE WILL NOT direct employees not to discuss working conditions with other employees.

WE WILL NOT direct employees to talk to us about their working conditions, rather than discussing them with other unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union as your exclusive collective-bargaining representative concerning the effects of our change in the on-call policy in the Women's Services Department.

ENLOE MEDICAL CENTER

Marilyn O'Rourke, Esq., for the General Counsel.
Laurence R. Arnold, Esq. (Foley and Lardner), of San Francisco, California, for the Respondent.
Donald Nielsen, Esq., Director, Arbitrations and Central Valley California Nurses Association, of Fresno, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Chico, California, on October 28, 2003, upon the General Counsel's complaint that alleged Enloe Medical Center (Respondent) violated Section 8(a)(1) and (5) of the Act by: directing employees not to discuss working conditions with other employees, by directing employees to talk to Respondent about their working conditions, rather than discussing them with other unit employees, by refusing to bargain with California Nurses Association (the Union) about the effects of its change in on-call policy from voluntary to mandatory and by dealing directly with employees regarding the effects of the change in on-call policy. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Chico, California (Respondent's facility), has been engaged in the operation of a hospital and medical clinics providing inpatient and outpatient medical care. During the past 12 months, Respondent in conducting its business operations derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $5000 which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

1. Did Respondent violate Section 8(a)(1) of the Act by:

(a) Directing employees not to discuss working conditions with other employees?

(b) Directing employees to talk to Respondent about their working conditions, rather than discussing them with other unit employees?

2. Did Respondent violate Section 8(a)(1) and (5) of the Act by:

(a) Refusing to bargain in good faith with the Union by failing to afford the Union an opportunity to bargain over the effects of its change in the on-call policy in the Women's Services Department?

(b) Refusing to bargain in good faith with the Union by bypassing the Union and dealing directly with employees regarding the effects of the change in on-call policy?

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Introduction

Respondent is a hospital providing acute and outpatient care services. Respondent's Women's Center consists of the labor and delivery departments. Pam Sime (Sime) is Respondent's vice president of human resources, Peggy Chelgren-Smith (Chelgren-Smith) is Respondent's director of the Women's Center, and Jennifer Eddlemon (Eddlemon) is the clinical coordinator of the Women's Center.

Since on or about September 20, 2000,[1] the Union has been the certified collective-bargaining representative of Respondent's full-time, regular part-time, per diem, and casual registered nurses whose duties involve providing patient care at Respondent's facilities in Chico, California. Kevin Baker (Baker) is the union representative at Respondent's Chico facilities. Cindy Smith (Smith) and Cathe Lawson are registered nurses and members of the bargaining unit.

2. The bargaining history

On July 8, 2002, the parties entered into an initial collective-bargaining agreement (Agreement) effective by its terms from January 14, 2002, to January 13, 2006.[2] It is Respondent's position that several provisions in the Agreement reflect that the Union waived its right to bargain over both the decision and effects of the decision to change Respondent's on-call policy. Those provisions are set forth below:

ARTICLE 2

MANAGEMENT RIGHTS

> Except as otherwise specifically provided in this Agreement, the Employer retains the sole and exclusive right to exercise all the authority, rights and/or functions of management. The Employer expressly retains the complete and exclusive authority, right and power to manage its operations and to direct its Nurses except as the terms of this Agreement specifically limit said authority, rights and powers.
>
> These retained authorities, rights and powers include, but are not limited to:
>
> Nurses.
>
> The right to select and assign work to Nurses in accordance with requirements as determined by management; to determine the existence, amount or lack of work, to increase or decrease the working forces; to determine the levels of staffing and number of Nurses to be employed in each position; to make and enforce reasonable rules for the maintenance of technical standards, discipline, efficiency or safety; to hire, promote, demote, transfer, layoff and recall Nurses; to assign Nurses to duties and hours of work; to create or discontinue job functions; to determine safety, health and property protection measures; to maintain order and efficiency in the Employer's operations; to discharge, suspend and otherwise discipline employees; to determine the qualifications required, size, composition and distribution of the working force; to supervise and direct Nurses in the performance of their duties; to set standards to insure the proper and efficient use of the working force and equipment; and otherwise to take such action management may determine to be necessary for safe, orderly, and efficient and economical operations. The Employer retains the sole and exclusive right to establish from time to time and to maintain the reasonable standards of performance required of bargaining unit Nurses.

Agreement article 6, compensation and hours of work, section h, on call and callback. This article provides for the method of payment of on-call and call-back nurses,

ARTICLE 12

SCHEDULING

Section A Posting of Schedules

> Nurses' work schedules and days off must be posted at least ten (10) days in advance of their commencement.

Section B Changes in Schedules

> 1. Once posted, the schedule will not be arbitrarily changed. Nurses may change days off with other Nurses in their classification and department/unit who have equivalent skills and/or competencies, provided overtime or other premium pay does not result, and so long as the change is approved in advance in writing by the appropriate immediate supervisor(s). Approval will not be unreasonably denied.

ARTICLE 21

PERSONNEL AND OTHER POLICIES

> The Employer's human resource policies, operating policies and other policies will continue to apply to covered Nurses, provided they are not in conflict with the express provisions of this Agreement. During the life of this Agreement, the Employer may revise, withdraw or supplement existing policies, and may *promulgate and implement* [emphasis added] additional policies, as it deems appropriate. Covered nurses will be advised of any revised, supplemented or new policies through posting, and will

[1] All dates herein refer to 2003, unless otherwise noted.

[2] R. Exh. 1.

> receive a copy of the employee handbook and a copy of any individual written revisions to the handbook. A copy of revised, supplemented or new human resources policies will also be forwarded to the Union.

Since the Agreement was ratified, Respondent has promulgated and implemented several policies, including policies on floating, low census (daily layoffs), and major holidays off. In addition Respondent combined two units to create one DCU unit. There is no evidence that the Union requested bargaining over these new policies.

3. The on-call policy

At the March 31 and April 1 monthly staff meetings in the Women's Center, Eddlemon told the nurses on her staff that she intended to adopt a mandatory on-call policy.[3] At the staff meetings of April 30 and May 1, Eddlemon again announced the change from a voluntary to a mandatory on-call policy for nurses in the Women's Center. She posted a copy of the policy and said it would become effective with the next schedule. The policy required the nurses in the Women's Center to take one mandatory 4-hour on-call shift every 4 weeks in addition to their regular shift. Eddlemon said there would be a 30-minute response time to get to work once an RN was called in to work. When asked what would happen if a person lived more than 30 minutes away, Eddlemon said that if anyone had problems meeting the time requirement, they should come to her and she would individually work something out with that person. Eddlemon told the nurses to come to see her if they had any questions concerning the new policy. During the second week in May, Smith saw a message written on the white board in the breakroom that stated if there were any questions about on-call work, RNs should speak to Eddelmon. The new policy was implemented on about May 10.

In early April, Union Representative Baker learned of the on-call policy change and called Vice President of Human Resources Sime. Baker asked Sime about the change and said Respondent could not do it without going through the Union. Sime replied that Respondent had done nothing yet. On May 7, Sime e-mailed Baker and advised that Respondent was implementing the new on-call policy on May 12. On May 9, Baker e-mailed Sime and said, inter alia, "Enloe does not have the 'right' to change one's working conditions without first bargaining the impacts with the Union."[4] On May 12, Baker learned that the on-call policy had been implemented. That day Baker called Sime and asked her when Respondent was planning to sit down and bargain the impacts of this decision with the Union. Sime replied that Respondent had no obligation to bargain with the Union. On about May 14, Baker again asked Sime if she was going to respond to his e-mail and whether Respondent was going to sit down and bargain with the Union.

There has been no bargaining over the effects of Respondent's decision to implement the new on-call policy.

[3] Until that time Respondent had a voluntary on-call policy in the Women's Center.

[4] GC Exh. 6.

4. The alleged 8(a)(1) conduct

In late winter or early spring 2003, Eddlemon made a change in the patient rand card, a written record used by nurses to pass patient information from shift to shift. The change in the Rand Card was a subject of discussion among the nurses in the Women's Center. In mid-April nurses Lawson and Smith met with Eddlemon to discuss the change in the rand card. Both Lawson and Smith expressed their dissatisfaction with the new system and expressed concern for patient safety. Lawson said the change was a violation of hospital policy. Eddlemon said she would get the policy changed. Lawson and Smith also discussed the proposed on-call policy change and said they did not agree with it. Lawson said that there were too many changes being handed down to the nurses and they were complaining that they were overwhelmed and upset.

At the April 24 charge nurses' meeting, the charge nurses presented Eddlemon with their concerns, inter alia, that some of the nurses were expressing negative attitudes and were complaining at the nurses' station. The four nurses named were: Smith, Lawson, Pinkham, and Murphy. It was decided that Eddlemon and Chelgren-Smith would "coach" Lawson and Smith. Simes defined "Coaching" as mentoring an employee to correct a potential concern. While not part of the disciplinary process, coaching may lead to discipline if the "potential" problem is not corrected.[5]

On April 29 Smith and Lawson were called into separate meetings with Chelgren-Smith and Eddlemon. Eddlemon read a prepared written document to each nurse. The paragraph read to Smith and Lawson was identical in text and stated:

> Your co-workers have talked to me about how your sometimes negative behavior affects all of the staff. For example, here are some quotes: "she brings me down, there is no team spirit, she is always complaining, sometimes I just can't take it, it makes coming to work very difficult."
>
> I'm wondering if you perceive yourself as doing this. Sometimes we do not recognize ourselves as others see us and it can be enlightening and/or devastating to learn how we are perceived by other. Once we know that, it is up to us to make the necessary changes within ourselves so that we are perceived by others in a more positive way.
>
> We need you on our team and expect that your negative behavior will change. How can we help you through this process?[6]

Both Smith and Lawson's feedback was recorded on the prepared document. It was noted that both Smith and Lawson agreed to refrain from negative comments or complaining in the nurses' station. During the meeting, Eddlemon told Smith that some of Smith's coworkers had come to her complaining that Smith had been complaining. Eddlemon said she did not want that kind of attitude carried out in our department and that if Smith had anything to complain about, she should complain directly to Eddlemon.

[5] GC Exh. 8, Procedure, Level 1—Verbal Counseling.

[6] GC Exhs. 3 and 4.

B. The Analysis

1. The 8(a)(1) allegations

It is well recognized that an employer violates Section 8(a)(1) of the Act by threatening an employee with reprisals for discussing working conditions with other employees and by telling employees to talk to employer representatives about working conditions rather than other employees. It is well established that Section 7 protects employees' right to discuss such matters with each other. *SKD Jonesville Division L.P.*, 340 NLRB 101 (2003); *Keller Ford*, 336 NLRB 722 (2001). Accordingly, a blanket prohibition on such discussions violates Section 8(a)(1), *Hilton's Environmental, Inc.,* 320 NLRB 437 fn. 2 (1995).

Without context, the statements that Eddlemon read to both Smith and Lawson on April 29 appear innocuous and unrelated to union or protected-concerted activities. The statement appears to be dealing only with Smith and Lawson's negative attitudes are negatively affecting coworkers. Eddlemon did not provide specific examples of Smith and Lawson's negative attitude. However, the record reflects that the only instances of complaints and negative attitude of Smith and Lawson had to do with their discussion of working conditions, including the Rand cards and on-call policy, with their fellow nurses. Thus, Eddlemon's reference to negative attitudes and complaints must have been about Smith and Lawson's protected concerted activity. While Respondent may argue that the April 29 meetings between Eddlemon, Smith and Lawson were not discipline but only coaching, there is no dispute that this coaching could lead to discipline if the behavior was not corrected.[7] Eddlemon's "coaching" of Smith and Lawson amounted to a directive to stop engaging in protected concerted activity or face formal discipline. I find that Eddlemon's April 29 "coaching" of Smith and Lawson to cease complaining to fellow employees and to come to management with their complaints violated Section 8(a)(1) of the Act.

2. The 8(a)(5) allegations

(a) The on-call policy and effects bargaining

There is no dispute that the Respondent's decision to issue a new on-call policy did not violate Section 8(a)(5) of the Act. What is at issue is whether Respondent had an obligation to bargain over the effects of the new on-call policy. Respondent contends that Charging Party waived its right to bargain over the effects of Respondent's decision to institute the new on-call policy both in the terms of the parties' collective-bargaining agreement and by failing to demand effects bargaining. Respondent argues further that Federal court of appeals rather than Board precedent should be followed in analyzing whether Respondent had an obligation to engage in effects bargaining regarding the on-call policy change. Respondent urges the Board to abandon its "clear and unmistakable waiver standard as set forth in *Good Samaritan Hospital*, 335 NLRB 901 (2001), and adopt Federal courts of appeals law.[8] It is unnecessary to address Respondent's argument. When there is a conflict between court and Board law, the Board's duty to apply uniform policies under the Act, as well as the Act's venue provisions for review of Board decisions, preclude the Board from acquiescing in contrary decisions by the courts of appeals. *Tim Foley Plumbing Service,* 337 NLRB 328 fn. 5 (2001); *Sandusky Mall,* 329 NLRB 618 fn. 10 (1999). Thus, I am bound to follow Board precedent rather than contrary precedents of the courts of appeals.

It is well settled that a union does not waive its statutory bargaining rights unless it has done so in a manner that is both clear and unmistakable. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). In evaluating whether there has been a clear and unmistakable waiver, both the Board and courts look to the precise wording of the relevant contract provisions to determine if the waiver is clear and unmistakable. Generalized management-rights clauses that do not refer to any particular subject area do not operate as waivers of statutory bargaining rights. In *Johnson-Bateman Co*., 295 NLRB 180, 184 (1969), the Board found that the reservation in a management-rights clause of an employer's unilateral right to issue, enforce, and change company rules did not constitute a waiver of the union's right to bargain about the implementation of drug/alcohol testing of current employees, because there was no specific reference in that clause to drug/alcohol testing. Also, in *Control Services*, 303 NRLB 481, 483–484 (1991), the Board found that the management-rights clause, which reserved to the employer the right to schedule hours of work and to relieve employees of duty, did not grant the employer the unilateral right to reduce employees' hours, because the union did not specifically waive its right to bargain over the number of hours employees would work.

In *Good Samaritan Hospital*, 335 NLRB 901 (2001), the Board found that the charging party union waived its right to bargain over the *implementation* (emphasis added) of a staffing matrix for registered nurses in a collective-bargaining agreement. The Board concluded that the collective-bargaining language underlined below evidenced the Union's waiver. In this regard the pertinent provision of the collective-bargaining agreement stated:

> SECTION 1. IN GENERAL Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital's right to determine and direct the policies, modes, and methods of providing patient care, *to decide the number of employees to be assigned to any shift or job,* [emphasis added] or the equipment to be employed in the performance of such work, to employ registry or traveling nurses when necessary to supplement staffing, to float employees from one working area to another working area within the division in which they are qualified to work, *or to determine appropriate staffing levels.*[emphasis added] Thus, the hospital reserves and retains, solely and exclusively, all the rights, privileges and prerogatives which it would have in the absence of this Agreement, except to the extent that such rights, privileges and prerogatives are spe-

[7] See fn. 5, supra.

[8] See *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255 (6th Cir. 1995); *NLRB v. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993).

> cifically abridged by express provisions of this Agreement.
>
> . . . .
>
> SECTION 2. ELABORATION OF RIGHTS In expansion rather than in limitation of the foregoing Section A, the Hospital shall have the following unilateral rights: (A) To determine the number, location, and types of facilities; (B) To subcontract any of the work or service; (C) To select, hire, and train employees, and to discipline and discharge employees for just cause; (D) To adopt, add to, amend, change or rescind any reasonable Hospital work rules.[9]

Notwithstanding this contract provision, the Board held that the union had not waived its right to effects bargaining. The Board stated:

> On the other hand, we find that there was no waiver of the Respondent's obligation to bargain about the effects of its decision to *implement* [emphasis added] new staffing matrices. Contractual language waiving a Union's bargaining rights as to a certain decision does not constitute a waiver of the right to bargain over that decision's effects. Even when the employer has no statutory obligation to bargain regarding a business decision because it does not involve "wages, hours, and other terms and conditions of employment" under Section 8(d), the Board has found a duty to bargain over effects. An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself. *KIRO, Inc*., 317 NLRB 1325, 1327 (1995), citing *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 681–682 (1981). Although in the present case we have found that the Respondent is not obligated to bargain concerning its decision based on the Union's waiver, rather than because the decision does not fall within the statutory scope of bargaining, the principle remains the same. In the absence of a clear and unmistakable waiver by the Union concerning effects bargaining, such bargaining is still required. We find no clear and unmistakable waiver as to effects bargaining in this case.[10]

The Board added, "The Respondent had an obligation to bargain about effects, on the Union's request, as long as there were alternatives that the parties could explore without calling into question the Respondent's underlying, nonbargainable decision. See, e.g., *Bridon Cordage, Inc.*, 329 NLRB 258 (1999). The Respondent has failed to establish here that there are no bargainable alternatives."[11]

Respondent argues that Agreement articles 2, 6H, 12, and 21 demonstrate that the Union clearly and unmistakably waived its right to effects bargaining over the new on-call policy. However, a comparison of the Agreement articles Respondent cites with the contract provisions in *Good Samaritan Hospital,* supra, results in a contrary conclusion.

Agreement articles 2, 6H, and 12 make no reference to a waiver by the Union of the right to bargain over the effects of Respondent's on-call policy. Under *First National Maintenance,* supra; *Good Samaritan,* supra; *Control Services,* supra; and *Johnson-Bateman,* supra, the requisite specificity in waiving the right to bargain over the on-call policy is lacking.

While Agreement article 21 references the right to promulgate and implement new human relations policies that apply to nurses, arguably giving rise to the Union's waiver of the right to bargain over the implementation of the new on-call policy, it does not operate as a waiver by the Union of its right to bargain over the effects of Respondent's implementation of the new on-call policy. There is no mention of a waiver of the right to effects bargaining over on-call policy. Respondent cannot rely on the generalized right to promulgate and implement new policy to refuse to engage in effects bargaining over the on-call policy. In this regard, Respondent's reliance on the use of the term "implementation" in article 21 is misplaced. Respondent would have me parse the term "implementation" to mean the Union waived the right to effects bargaining. This is a misconstruction of the term implementation as it has been applied by the Board. Respondent confuses implementation, i.e., putting into effect with effects bargaining. The Board has used the term implementation in conjunction with bargaining over decisions, as in "to *implement* [emphasis added] new staffing matrices." or the "effects of its decision to *implement* [emphasis added] new staffing matrices." *Good Samaritan Hospital,* supra at 902. The Board used the term implement similarly in *King Soopers,* supra at 1, in stating "The Respondent did not notify or bargain with the Union before *implementing* [emphasis added] the policy." I find that the Union has neither clearly nor unmistakably waived its right in the terms of the Agreement to bargain over the effects of Respondent's decision to implement the new on-call policy.

Respondent also contends that by its failure to demand effects bargaining when Respondent has implemented other policy in the past and by waiving the right to receive notices of policy changes other than human relations policy, the Union has shown it waived its right to effects bargaining over the on-call policy.

A union may waive its right to bargain about mandatory subjects in any of three ways: by express provision in the collective-bargaining agreement, which I have concluded did not occur as to effects bargaining, by the conduct of the parties (including past practice, bargaining history, and action or inaction), or by a combination of the two. *United Technologies Corp*., 274 NLRB 504, 507 (1985).

Initially, contrary to Respondent's assertion, I find there is no evidence the Union waived its right to receive notices of policy changes. The language in Agreement article 21 is certainly not sufficiently specific with respect to waiver of receiving notices of policy changes to operate as a waiver.

Moreover, there is no bargaining history concerning the on-call policy other than the manner in which rates of pay are calculated. The evidence adduced at the hearing concerning past practice establishes only that Respondent has notified the Union about schedule changes and the Union has acquiesced in the changes. It is clear that past acquiescence to previous changes

[9] *Good Samaritan Hospital,* supra at 902.
[10] Id.
[11] Id. at 903–904.

does not operate to waive a union's right to bargain over future changes. *Owens-Brockway Plastic*, 311 NLRB 519, 526 (1993). I find that there has been no waiver of the right to effects bargaining over on-call policy by past bargaining history or conduct.

Respondent next argues that under *Good Samaritan* because Union Representative Baker could not give examples of any bargainable effects, there were no alternatives the parties could have explored without calling into question Respondent's underlying non bargainable decision. Respondent cannot rely on Baker's courtroom enumeration of alternatives to satisfy its burden under *Good Samaritan* that there were no alternatives. Indeed the Board has indicated it is not proper to prejudge the range of alternative bargaining subjects prior to bargaining. "The obligation to provide the Union with notice and an opportunity to bargain about effects is not conditioned on [a] view . . . as to what, if any effects will be identified or how they will be resolved by the parties."[12]

Respondent next in order contends that the *Good Samaritan* rule is inapplicable in cases where the union waived its right to bargain over the decision. Respondent essentially argues that the Board should change the rule in *Good Samaritan* because it is absurd to distinguish between an employer's decision to implement rules and their effects. The only case Respondent cites to support this novel theory is *Peerless Publications, Inc*., 283 NLRB 334 (1987). However, the Board has found that *Peerless Publications* is of limited applicability outside the narrow factual situation presented in the newspaper industry.[13] I find no support for Respondent's argument.

Finally Respondent argues that the Union did not demand bargaining over the effects of the on-call policy. While Board law is clear that a union must make a timely demand for bargaining,[14] it is also clear that a union is absolved from that requirement when the employer presents the union with a fait accompli by implementing a decision without prior timely notice of the decision to implement.[15]

First, I find that the Union made a timely request to bargain over the effects of Respondent's implementing the new on-call policy. On May 9, Baker e-mailed Sime and said, inter alia, "Enloe does not have the 'right' to change one's working conditions without first bargaining the impacts with the Union." A reasonable reading of this e-mail indicates that Respondent was put on notice that the Union was demanding bargaining before the on-call policy was implemented. Moreover, Baker's uncontradicted, credited testimony was that he demanded effects bargaining on May 12, when Baker called Sime and asked her when Respondent was planning to sit down and bargain the impacts of this decision with the Union. Sime replied that Respondent had no obligation to bargain with the Union. Again on about May 14, Baker again asked Sime if she was going to respond to his e-mail and whether Respondent was going to sit down and bargain with the Union.

Assuming, arguendo, that Baker's May 9 e-mail was not a sufficient demand for bargaining, I find that the requirement to demand bargaining was absolved by Sime's May 7 e-mail that presented Baker with the fait accompli that Respondent was implementing the new on-call policy on May 12. Moreover, Sime's statement on May 12 that Respondent did not have to bargain with the Union establishes Respondent had no intent to bargain, further absolving the Union of the requirement to demand effects bargaining.

(b) Respondent's direct dealing and bypassing the Union

Whether Respondent has engaged in unlawful direct dealing with its employees in violation of Section 8(a)(5) and thereby bypassed the Union, it must be shown that Respondent is communicating with its represented employees and that the discussion is for the purpose of establishing or changing the wages, hours, and terms and conditions of employment within the meaning of Section 8(d) to the exclusion of the Union; *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); *Obie Pacific*, 196 NLRB 458, 459 (1972).

The General Counsel argues that Respondent bypassed the Union and dealt directly with represented employees in early May, when Eddlemon told employees that they should come to her and she would individually work something out with that person and that the nurses should come to see her if they had any questions concerning the new [on call] policy and in the second week of May when Respondent placed a message on the white board in the breakroom that stated if there were any questions about on-call work, RNs should speak to Eddlemon. Respondent argues there was no direct dealing.

There is no dispute that Eddlemon communicated with employees represented by the Union in May about the new on-call policy. At the May staff meetings, in response to a question about the 30 minutes a nurse was given to report to work after being called for those nurses who lived more than 30 minutes from the hospital, Eddlemon replied that the nurses should come to her to work something out. The purpose of the discussion dealt with a mandatory subject of bargaining, i.e., changing the response time to report to work. This is precisely the type of adjustment that was contemplated in *Good Samaritan* without effecting the underlying decision to institute a mandatory on-call policy. By arrogating to itself the adjustment of the effects of the on-call policy to the exclusion of the Union, Respondent dealt directly with the represented employees and bypassed the Union in violation of Section 8(a)(5) of the Act.

CONCLUSION OF LAW

By directing employees not to discuss working conditions with other employees, by directing employees to talk to Respondent about their working conditions rather than discussing them with other employees, by refusing to bargain in good faith with the Union by failing to afford the Union an opportunity to bargain over the effects of its change in the on-call policy in the Women's Services Department and by bypassing the Union and dealing directly with employees regarding the effects of the change in the on-call policy, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

[12] Id.
[13] *King Soopers, Inc*., 340 NLRB 628 (2003).
[14] *Lenz & Riecke*, 340 NLRB 143, 146 (2003).
[15] *Bridon Cordage*, 329 NLRB 258 (1999).

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time, per diem, and casual registered nurses whose duties primarily involve providing patient care, i.e., those classified as "registered nurse' in the following areas: ambulatory services, cardiac cath lab, cardio stepdown, behavioral health, cancer center, extended care, children's health, prompt care, CT scanner, DCU, emergency, EOC-cardio-pulmonary rehab, EOC-endoscopy clinic, EOC-Infusion, EOC-prompt care, EOC-surgery, gastro-intestinal, home care, hospice, ICU/CCU, interventional radiology, med/surg oncology, medical/surgical (also known as Medical East), med/surg ortho (also known as Third Floor), N/TSICU, ob-maternity, pedicatrics, post-anesthesia care, radiation-oncology, radiology, rehabilitation care, surgery services, SWAT (float pool nurse), Touchstone (also known as Options for Recovery), women's services, and wound/ostomy services: and breast educator nurse; diabetes educator nurse; cardiovascular educator nurse; rehab intake coordinator; relief charge nurses; and registered nurse first assists, employed by the employer at its facilities located at Esplanade Hospital at 1531 Esplanade, Chico, California 95926; Cohasset Hospital at 560 Cohasset Road, Chico, California 95926; Rehabilitation Center at 340 West East Avenue, Chico, California 95926; Outpatient Center at 888 Lakeside Village Commons, Chico, California 95928; Homecare & Hospice at 1390 East Lassen Avenue, Chico, California 95973; and Children's Health Center at 277 Cohasset Road, Chico, California 95926. Excluding: all other employees, office clerical employees; managerial employees; guards; outside registry nurses; "traveler" registered nurses; confidential employees nurse practitioners; Case Managers, all other educators including Acute Care Educators, Clinical Coordinator Educator, Clinical Educator, and RN-Educator; Admitting Nurse; Employee Health Nurse; Infection Control Nurse; Liaison Nurses; program manager, registered nurses at Los Molinos clinic; registered nurses in Public Relations; registered nurses employed in positions which do not require current licensure as an RN; and supervisors as defined in the Act, including but not limited to, Administrative House Supervisor, Charge Nurse, Chief Flight Nurse/PCC, Clinical Coordinator, Clinical Director, Coordinator-Projects (Surgery Services), Coordinator (RN), Director, Manager, Nurse Directors, Quality Project Coordinator, Quality/Risk/Trauma Coordinator (Utilization Management), Supervisor-EOC, Trauma Care Coordinator, Vice President Outpatient Services and Vice President Surgical Services,

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Enloe Medical Center, Inc., Chico, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union as the exclusive representative of our employees in the following appropriate unit:

> All full-time and regular part-time, per diem, and casual registered nurses whose duties primarily involve providing patient care, i.e., those classified as "registered nurse' in the following areas: ambulatory services, cardiac cath lab, cardio stepdown, behavioral health, cancer center, extended care, children's health, prompt care, CT scanner, DCU, emergency, EOC-cardio-pulmonary rehab, EOC-endoscopy clinic, EOC-Infusion, EOC-prompt care, EOC-surgery, gastro-intestinal, home care, hospice, ICU/CCU, interventional radiology, med/surg oncology, medical/surgical (also known as Medical East), med/surg ortho (also known as Third Floor), N/TSICU, ob-maternity, pedicatrics, post-anesthesia care, radiation-oncology, radiology, rehabilitation care, surgery services, SWAT (float pool nurse), Touchstone (also known as Options for Recovery), women's services, and wound/ostomy services: and breast educator nurse; diabetes educator nurse; cardiovascular educator nurse; rehab intake coordinator; relief charge nurses; and registered nurse first assists, employed by the employer at its facilities located at Esplanade Hospital at 1531 Esplanade, Chico, California 95926; Cohasset Hospital at 560 Cohasset Road, Chico, California 95926; Rehabilitation Center at 340 West East Avenue, Chico, California 95926; Outpatient Center at 888 Lakeside Village Commons, Chico, California 95928; Homecare & Hospice at 1390 East Lassen Avenue, Chico, California 95973; and Children's Health Center at 277 Cohasset Road, Chico, California 95926. Excluding: all other employees, office clerical employees; managerial employees; guards; outside registry nurses; "traveler" registered nurses; confidential employees nurse practitioners; Case Managers, all other educators including Acute Care Educators, Clinical Coordinator Educator, Clinical Educator, and RN-Educator; Admitting Nurse; Employee Health Nurse; Infection Control Nurse; Liaison Nurses; program manager, registered nurses at Los Molinos clinic; registered nurses in Public Relations; registered nurses employed in positions which do not require current licensure as an RN; and supervisors as defined in the Act, including but not limited to, Administrative House Supervisor, Charge Nurse, Chief Flight Nurse/PCC, Clinical Coordinator, Clinical Director, Coordinator-Projects (Surgery Services), Coordinator (RN), Director, Manager, Nurse Di-

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

rectors, Quality Project Coordinator, Quality/Risk/Trauma Coordinator (Utilization Management), Supervisor-EOC, Trauma Care Coordinator, Vice President Outpatient Services and Vice President Surgical Services,

(b) Bypassing the Union and dealing directly with bargaining unit employees concerning wages, hours and other terms and conditions of employment.

(c) Directing employees not to discuss working conditions with other employees.

(d) Directing employees to talk to Respondent about their working conditions, rather than discussing them with other unit employees.

(e) In any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time, per diem, and casual registered nurses whose duties primarily involve providing patient care, i.e., those classified as "registered nurse' in the following areas: ambulatory services, cardiac cath lab, cardio stepdown, behavioral health, cancer center, extended care, children's health, prompt care, CT scanner, DCU, emergency, EOC-cardio-pulmonary rehab, EOC-endoscopy clinic, EOC-Infusion, EOC-prompt care, EOC-surgery, gastro-intestinal, home care, hospice, ICU/CCU, interventional radiology, med/surg oncology, medical/surgical (also known as Medical East), med/surg ortho (also known as Third Floor), N/TSICU, ob-maternity, pedicatrics, post-anesthesia care, radiation-oncology, radiology, rehabilitation care, surgery services, SWAT (float pool nurse), Touchstone (also known as Options for Recovery), women's services, and wound/ostomy services: and breast educator nurse; diabetes educator nurse; cardiovascular educator nurse; rehab intake coordinator; relief charge nurses; and registered nurse first assists, employed by the employer at its facilities located at Esplanade Hospital at 1531 Esplanade, Chico, California 95926; Cohasset Hospital at 560 Cohasset Road, Chico, California 95926; Rehabilitation Center at 340 West East Avenue, Chico, California 95926; Outpatient Center at 888 Lakeside Village Commons, Chico, California 95928; Homecare & Hospice at 1390 East Lassen Avenue, Chico, California 95973; and Children's Health Center at 277 Cohasset Road, Chico, California 95926. Excluding: all other employees, office clerical employees; managerial employees; guards; outside registry nurses; "traveler" registered nurses; confidential employees nurse practitioners; Case Managers, all other educators including Acute Care Educators, Clinical Coordinator Educator, Clinical Educator, and RN-Educator; Admitting Nurse; Employee Health Nurse; Infection Control Nurse; Liaison Nurses; program manager, registered nurses at Los Molinos clinic; registered nurses in Public Relations; registered nurses employed in positions which do not require current licensure as an RN; and supervisors as defined in the Act, including but not limited to, Administrative House Supervisor, Charge Nurse, Chief Flight Nurse/PCC, Clinical Coordinator, Clinical Director, Coordinator-Projects (Surgery Services), Coordinator (RN), Director, Manager, Nurse Directors, Quality Project Coordinator, Quality/Risk/Trauma Coordinator (Utilization Management), Supervisor-EOC, Trauma Care Coordinator, Vice President Outpatient Services and Vice President Surgical Services,

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and papers, and all other records, including an electronic copy of such records if stored in electronic form necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Chico, California, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."